***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-7233

*To be argued by*
NED R. PHILLIPS

In The

## United States Court of Appeals

For The Second Circuit

EARL B. LEWIS, HERBERT D. PARSONS, ROBERT J.C. MURRAY, RUTHVEN H. LEE, CLARENCE T. CHLADEK, ROBERT C. ARCH, HARRY L. DAVIS, O.C. SMITH, KENNETH TAYLOR, FRANCIS C. KOPAS, JAMES H. RICHMOND, JR., CULVER Q. HOLT, WILLIE P. JACQUET, ANTHONY ALVES, ALBERT F. RYAN, JOHN KARDOS, TIMOTHY J. O'DONOVAN, MARTIN J. URBAN, LOUIS G. FONTENOT, JACQUES H. BLANCHARD, ROBERT O. MEDLOCK, MONICO DAVIS, ATHENS WALKER, JOSEPH A. BARON, MELVIN JAMES, JOE W. THROWER, JUNIOUS McCALL, HAROLD F. McLEAN, JOSEPH H. BOLAND, THOMAS W. CHASTAIN, JR., PHILIP AUSTER, MAURICE C. LEBLANC,

*Plaintiffs-Appellees,*

*vs.*

TEXACO, INC.,

*Defendant-Appellant.*

*On Appeal from the United States District Court for the Southern District of New York*

# BRIEF FOR APPELLEES

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TREATISES

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 75-7233

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EARL B. LEWIS, HERBERT D. PARSONS, ROBERT J.C. MURRAY, RUTHVEN H. LEE, CLARENCE T. CHLADEK, ROBERT C. ARCH, HARRY L. DAVIS, "O" "C" SMITH, KENNETH TAYLOR, FRANCIS C. KOPAS, JAMES H. RICHMOND, JR., CULVER Q. HOLT, WILLIE P. JACQUET, ANTHONY ALVES, ALBERT F. RYAN, JOHN KARDOS, TIMOTHY J. O'DONOVAN, MARTIN J. URGAN, LOUIS G. FONTENOT, JACQUES H. BLANCHARD, ROBERT O. MEDLOCK, MONICO DAVIS, et al.

Plaintiffs-Appellees,

-against-

TEXACO, INCORPORATED,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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# BRIEF ON BEHALF OF APPELLEES

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## Statement of Issues Presented For Review

Although not specifically enumerated in appellant's brief following are the issues raised therein on this appeal.

1. Whether a seaman's signature in the release column of shipping articles in acceptance of his earned wages constitutes a bar to an action for the statutory remedies provided for by 46 U.S.C., Sec. 594.

2. Whether Judge MacMahon committed judicial error in holding, inter alia, that plaintiff's "state of mind" is at issue where a release is set up as a bar to enforcement of seamen's rights and that in such case defendant bears the burden of proving that such claimed surrender of rights was given "without duress and with full knowledge of what it meant."

3. Whether the acceptance of new employment by any plaintiff constitutes a waiver of the statutory remedies provided for by 46 U.S.C., Sec. 594 for a breach of the shipping articles on a prior voyage.

4. Whether the Court below abused its discretion in refusing an adjournment on the eve of trial to permit defendant to take additional depositions where defendant made no application therefor for over a year since the Court stated it would entertain such applications.

5. Whether the statute involved is constitutional in its application to the facts of this case.

6. Whether the findings of fact by the Court below are so clearly erroneous as to warrant this Court making findings de novo.

7. Whether the Court below abused its discretion in awarding interest to plaintiffs.

8. Whether the Court below abused its discretion in awarding counsel fees.

## Statement of the Case

### Proceedings in the Court Below

This is an action by 32 seamen plaintiffs for the statutory remedy of one months wages pursuant to 46 U.S.C. 594 arising out of a breach of shipping articles by defendant and the discharge of plaintiffs without fault on their part and without their consent before they earned one month's wages. Plaintiffs also sought the statutory remedy of 2 days wages for each day payment was delayed pursuant to 46 U.S.C. 596 as well as interest and counsel fees. The case was tried non-jury. The Court below found in favor of plaintiffs and awarded one month's wages, interest and counsel fees from which defendant appeals. The Court dismissed the

claim under 46 U.S.C. Sec. 596. No appeal is taken therefrom.

Statement of Facts

On January 6, 1971, plaintiffs herein signed foreign shipping articles with defendant which provided for a voyage from "...the Port of Port Everglades, Florida to one or more ports in the Gulf and/or Caribbean and Panama and thence to one or more ports on the Pacific Coast of the Continental United States, exclusive of Hawaii and Alaska; to a final port of discharge on the Pacific Coast of the United States, for a period of time not exceeding (90) days." (Exh. "A", TT 209)

The vessel did not make the voyage as set forth in the shipping articles, instead, after the commencement of the voyage and before one month's wages were earned the vessel was diverted back to the United States to Taft, Louisiana, on January 21, 1971, at which time the articles were terminated, the voyage ended and the seamen paid their earned wages for the 16-day period. (Exh. "A", TT 209, TT 94)

Termination of the voyage was the unilateral decision of defendant without the consent of any of the plaintiffs. (TT 21-22, 40, 89-90, 162-163)

The shipping articles make reference to numerous statutes from Title 46 U.S. Code. Section 594 is not among them. (Exh. "A", TT 209)

All of the plaintiffs signed off the shipping articles as directed by the Shipping Commissioner, received discharges from him and their earned wages from the master. (TT 104)

In the column above their signature is the following paragraph:

> "We the undersigned seamen do hereby each one for himself by our signatures herewith given in consideration of settlements made before the shipping commissioner, release the Master and owners from all claims for wages in respect of this voyage or engagement, and I, the Master, do also release each of the undersigned seamen from all claims, in consideration of this release signed by them." (Exh."A" TT 209)

Neither the Shipping Commissioner, nor the master, nor any other officer ever asked any of the plaintiffs to read the cited language, called their attention to it in any way or informed them that by signing off the articles they were surrendering all rights to one month's wages under 46 U.S.C. Sec. 594 (TT 20-25, 41-43, 87, 100, 138).

Questions were raised by the crew to the captain and their union representatives as to whether or not they were entitled to any additional compensation by reason of the defendant's breach of shipping articles. (TT 16-17, 32, 34-35, 86-87, 120-121)

Their union representative who had no prior experience with 594 instructed the crew members to protest at the time of signoff, but made no mention of the manner in which the protest should be made and was not present at the signoff. (TT 123-127)

After the termination of the voyage in suit all but six of the plaintiffs signed coastwise articles aboard the vessel. (TT 213, deft. brief p. 5)

None of the plaintiffs ever expressed any intention to waive any claims they may have had under 594. (TT 23-24, 40-41, 88)

Under identical circumstances with the same individual in charge of their labor relations defendant in 1967 paid one month's wages pursuant to 46 U.S.C., Sec. 594 after aborting a foreign voyage. (TT pp. 133-140)

After the commencement of litigation herein defendant noticed the deposition of all thirty-two plaintiffs. (Deft. brief p. 3) Plaintiffs moved for a protective order.( A11-17) The report of Magistrate Goettel to whom it was referred, ultimately confirmed

by Judge Gurfein to take effect February 7, 1972,[1] provided, in relevant part, as follows

> "...fifteen of the seventeen (plaintiffs) are still aboard the same vessel. The Texaco vessels come into the port of New York on occasions.
>
> Consequently, the defendant should be allowed to take the depositions of any plaintiffs who arrive in the port of New York, or within 100 miles from New York (i.e. ports in the State of Pennsylvania, New Jersey and Connecticut). Since these plaintiffs are in the employ of the defendant, defendant will be well aware of their movements and able to notify plaintiffs' counsel when they will be in a suitable geographic location to be deposed.
>
> If the Illinois has not been within 100 miles of New York during that period, the plaintiffs should then arrange to transport the three plaintiffs who served as the union representatives for their departments to New York for the taking of their depositions.
>
> When the foregoing procedures have been completed, either by deposing the fifteen plaintiffs on the Illinois, or by taking the three union representatives depositions, the defendant

---

[1] The Magistrate's report dated September 16, 1971 was originally confirmed December 1, 1971. (A 25). On learning of the pendency of plaintiff's motion for summary judgment Judge Gurfein suspended the order providing for its immediate reinstatement in the event the motion was denied. (A 32) This occurred on February 7, 1972 (A 68)

> may then make further application for additional depositions if it deems it necessary. At that time, based upon the evidence obtained in the depositions, the Court will then be in a better position to determine whether oral depositions of each of the plaintiffs are truly necessary." (A 29-31)

On March 1, the deposition of plaintiff Clarence Chladek was held at defendant's office. (TT 12)

On March 28, 1972, the deposition of plaintiff Joseph Boland who was also the principal union representative aboard the vessel was taken on board the Texaco Nebraska in New Jersey. (A 74, TT 30-31, 58)

A third plaintiff was tendered for deposition on April 5 during evening hours but counsel for defendant was unavailable and his vessel sailed before he could be deposed. (A 74-75, 81)

At no time did defendant's counsel advise counsel for plaintiff of the availability of any of the fifteen plaintiffs aboard the Texaco Illinois nor any other vessel. (A 81-82)

Some time between February 1972 and August 1972 the case was assigned to Judge Motley for all purposes.

On August 15, 1972, defendant made application to Judge Motley for, inter alia, an order to compel "certain additional" but unspecified plaintiffs to appear for deposition. (A 70)

After argument, the Court on November 6, 1972 directed that depositions of the Shipping Commissioner and the Union representative be taken adding that "Thereafter, the Court will rule on the necessity for taking any further depositions of the plaintiffs." (A 87)

Pursuant to said order on January 3, 1973, these depositions as well as that of the Master of the vessel were taken in New Orleans. (A 99)

On August 29, 1974, Pre-Trial Order was filed herein in which defendant consented that the witnesses would be those whose depositions had been taken. (A 120-121)

In its brief on the constitutional issues submitted to the Court after a trial date had been set on September 20, 1974, defendant requested a stay of trial to take additional depositions which was denied. No motion was made. (A 120-121).

## ARGUMENT

### I

### A SEAMAN'S SIGNATURE IN THE RELEASE COLUMN OF SHIPPING ARTICLES IN ACCEPTANCE OF HIS EARNED WAGES DOES NOT CONSTITUTE A BAR TO AN ACTION FOR THE STATUTORY REMEDIES PROVIDED FOR BY 46 U.S.C., Sec. 594

The cause of action asserted in this litigation by plaintiffs arise under Section 594 of 46 U.S.C., Revised Statutes of the United States §4527 commonly known as the Merchant Seamen's Act of June 7, 1872, C322, §2117 Stat. 366.

The Statute provides as follows:

> §§594. Right to wages in case of improper discharge.
>
> Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case of having been improperly discharged, recover such compensation as if it were wages duly earned. R.S. §4527."

There has never been any suggestion of fault on the part of plaintiffs justifying their discharge and it is conceded that the voyage was terminated before one month's wages were earned.

The only substantive defense raised is consent, either by way of release or by waiver in accepting new employment aboard the same vessel.

Defendant contends that the mere act of signing off the shipping articles in the column bearing the general release language bars their right to maintain an action under a statute not appearing on the articles, not read to them or called to their attention in any manner and utterly without any consideration therefor.[2] This is not the law.

It is well settled that "the burden is upon one who sets up a seamen's release to show that it was executed freely, without deception or coercion and that it was made by the seaman with full understanding of his rights." Garrett v. Moore-McCormack Company, Inc., 317 U.S. 239 (1942). Unless the seamen comprehended that they were giving up future claims to anything other than earned wages, it cannot be said thatthey consented to the surrender of their rights under 46 U.S.C. 594.

---

[2] The seamen received their earned wages at the signoff. It cannot be seriously suggested that they would or could be denied their wages if they decided not to sign off the shipping articles.

As was stated in O'Connor v. Panama Canal Co., 1952 A.M.C. 1575 (N.Y. Mun. Ct. 1952):

> "'The mere fact that a release was signed before a Shipping Commissioner - the release consists of the seaman signing his name in a column headed 'Release' followed by some finely printed verbiage - no longer in and of itself bars a seaman's just claim.' NORRIS, The Law of Seamen, Sec. 516; Brown v. U.S., 283 Fed. 425; Murphy v. American Mail, 1945 A.M.C. 1212, 62 F. Supp. 97; Billings v. Bausback, 200 Fed. 523'"

The standard type of release language found in shipping articles signifies nothing more than a release for earned wages unless it expressly releases respondent from liability for other claims a seaman might have. Murphy v. American Mail Line, 62 F. Supp. 97 (W.D. Wash. 1945) Isthmian Lines, Inc., v. Burl Haire, 334 F.2d 521, (5th Cir. 1964).

In Gonzalez v. Isthmiam S.S. Co., 1958 A.M.C. 97 (E.D. Pa. 1957), respondent claimed a seaman's signature to the shipping articles in acceptance of his earned wages was a bar to an action by the seaman for double wages under 46 U.S.C., 596. The court disposed of this contention as follows:

> "...the alleged releases would be inoperative for failure of respondent to maintain the burden of establishing that the purported effect of the documents as releases was fully

> comprehended by the seaman and that there had been a full disclosure to the seamen of the legal rights they were giving up in exchange for the settlement offer."

See also Young v. Alcoa Corsair, 186 F. Supp. 476 (S.D. Ala. 1960), 1960 A.M.C. 2011.

The test of validity of a seaman's release is as set forth in Stichon v. American Export Lines, Inc., 113 F.2d 830, (2d Cir 1940), cert. den. 311 U.S. 705, is:

> "...whether the seaman, if he is acting alone, has intelligence enough fully to understand the situation and the risk he takes in giving up the right to prosecute his claim or whether, if he is acting under advice, that advice is disinterested and based on a reasonable investigation."

Even if it could be argued that the release was valid it would still be limited as a matter of law to the earned wages actually received at the time and could not bar any claim for statutory benefits for lack of consideration.

Isthmian Lines v. Haire, supra.

Caffyn v. Peabody, 140 Fed. 294 (D.C.W.D. Wash. N.D. 1906).

Brown v. U.S., 283 Fed. 425 (N.D. Cal. 1922).

The rule was stated with simple brevity in Haire, at 523:

"...as a principle of ordinary law - landlocked, seagoing or amphibious - a release for payments admittedly due lacks consideration."

The legal philosophy of the courts, underlying the approach to a seamen's alleged voluntary surrender of protection accorded him by the law is best exemplified by the language of Justice Story in Harden v. Gordon, Fed. Cas. 6047 at pp. 480, 485, cited with approval in Garrett v. Moore McCormack, supra:

"...They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees.*** If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.***
And on every occasion the court expects to be satisfied, that the compensation for every material alteration is entirely adequate to the diminution of right or privilege on the part of the seamen."

Defendant's failure to comprehend this rule is evident in its contention that plaintiffs must establish absence of consent by formal protest on the face of the shipping articles, citing as authority Newton v. Gulf Oil Corp., 180 F.2d 491 (3rd Cir. 1950), cert. denied 340 U.S. 814. (1950)

In that case the Court by way of dicta noted the fact of written protest as an answer to "... some argument about the necessity of showing lack of consent" id. at 492. Nowhere in this or any other case cited by defendant is a formal protest upon the articles a legal requirement as a condition precedent to asserting a claim under 594. Any other result would effectively nullify Garrett v. Moore McCormack and its multitudinous progeny. How could plaintiffs have been expected to make a formal protest when they did not fully comprehend their rights? Not until after the voyage when they had an opportunity to meet with counsel were they told from a responsible source that they had a viable cause of action under the statute. (A 95)

It is difficult to comprehend the arguments in defendant's brief. On the one hand, he appears to be attacking the very articles on which he relies so

strongly contending that they are "archaic" and a "Government release" forced upon the shipping company rather than a "shipowner's release." On the other hand, he argues that in some mysterious manner the enunciated rules of Garrett v. Moore McCormack Co., supra and Bonici v. Standard Oil Co. of New Jersey, 103 F.2d 437 (2nd Cir. 1939) setting forth the burden of proof and standard of care in seamen's releases are somehow to be limited to personal injury cases. It is difficult to conceive of any court approving a double standard with regard to seamen's releases and showing less solicitude for the wages of seamen than for their physical disabilities.

Jones v. American Export Isbrandsten Lines, Inc., 285 F. Supp. 345 (S.D.N.Y. 1968), so heavily relied on by defendant is completely inapposite. In Jones, the court found that the seaman "...failed to establish...that he was dismissed without sufficient cause" id. at p. 348.

The reference in Jones to the article release was expressly limited to the claim for overtime compensation and transportation, not any claim under 594, and the court expressly found that there was "... consideration for the libellant's release..." a factor notably absent in the instant case.

The testimony in this case is overwhelming and undisputed that express consent to surrender rights under

594 was never given by the seamen nor asked by the company when the releases were signed. As plaintiff Chladek put it simply and eloquently "If I was entitled to 30 days' pay, I wanted it." (TT 18-19)

For the foregoing reasons and on the basis of the cited authorities it is clear that the release language contained in the shipping articles does not bar this action and cannot remotely be construed as consent to the breach of articles by defendant.

II

JUDGE MacMAHON DID NOT COMMIT JUDICIAL ERROR IN HOLDING, INTER ALIA, THAT PLAINTIFF'S "STATE OF MIND" IS AT ISSUE WHERE A RELEASE IS SET UP AS A BAR TO ENFORCEMENT OF SEAMEN'S RIGHTS AND THAT IN SUCH CASE DEFENDANT BEARS THE BURDEN OF PROVING THAT SUCH CLAIMED SURRENDER OF RIGHTS WAS GIVEN "WITHOUT DURESS AND WITH FULL KNOWLEDGE OF WHAT IT MEANT."

Defendant argues that the Courts below[3] committed error in holding that the burden of proof of validity of the release is upon the proponent, in this case Texaco. (Deft. brief pp. 3, 10-12)

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[3] Defendant claims the original error was committed by Judge MacMahon in his opinion denying the motion for summary judgment (A 65-68) and compounded by Judge Motley at trial.

It is impossible to tell whether the cases listed on this point in defendant's brief are cited in support of its contention. If so they could not have been read.

Garrett v. Moore McCormack Company, supra has been quoted extensively in Point I and is the landmark case for the proposition that the "burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights" id. at p. 248. Garrett expressly includes seamen's releases for wages signed before a shipping commissioner within the ambit of the rule id. at p. 247

Bonici v. Standard Oil Co. of New Jersey, supra makes no reference whatsoever to shipping article releases but deals with a release of a maintenance claim and expressly places the burden on the proponent of the release as follows:

> "...one who claims that a seaman has signed away his rights to what in law is due him must be prepared to take the burden of sustaining the release as fairly made with and fully comprehended by the seaman " id. at pp. 438-439

Jones v. American Export Lines, supra, cited Bonici with approval finding that under the facts of the case plaintiff was not entitled to recover.

Not one case is cited in defendant's brief supporting its contention that the burden of proving the invalidity of a release is the seaman's. Reading its extended argument about the "archaic" releases and "pointless statutory requirements" it becomes evident that Texaco is asking this Court, without any legal support, to turn back the clock about 100 years, repeal the seamen's protective statutes, do away with shipping commissioners and allow the Company to do business as it pleases.

As a matter of law, the Courts below were correct in holding the burden of proving the seamen knew of and intended to surrender their rights to the statutory remedy under 594 at the time of signoff was Texaco's. That burden has clearly not been met by defendant.

III

THE ACCEPTANCE OF NEW EMPLOYMENT BY PLAINTIFFS DOES NOT CONSTITUTE A WAIVER OF THE STATUTORY REMEDIES PROVIDED FOR BY 46 U.S.C. SEC. 594 FOR A BREACH OF THE SHIPPING ARTICLES ON A PRIOR VOYAGE

It is not clear from the argument in defendants brief whether or not the waiver defense has been abandoned. (Deft. brief pp. 18-21) Some of the cases cited were brought to the attention of the Court below in an earlier brief and this issue is listed as one of ten in the Pre-Argument Statement filed with this Court.

Acceptance of new employment does not constitute a waiver of any rights under 594 by reason of breach of articles on a prior voyage. Newton v. Gulf Oil Co., 180 F.2d 491, 493 (3rd Cir. 1950); Neil v. Gulf Oil Co., 101 F.Supp. 347 (E.D. Pa. 1951); Lunquist v. SS Seatrain Maryland, 359 F.Supp. 663 (D.C. Md. 1973).

The John R. Bergen, 122 Fed. 98 (S.D.N.Y. 1903) holds that acceptance of new employment aboard the same vessel operates as a waiver. However, in the light of the decision in The Steel Trader, 275 U.S. 388 (1928) which held that the statute (594) established a rule of liquidated damages for breach of contract and the above mentioned cases the Bergen case would no

longer appear to be authoritative. To the same effect see Norris, Law of Seamen, 3rd Ed.V.1, Sec. 376, n.15; Hughes v. Southern Pac. Co., 274 Fed. 876 (S.D.N.Y. 1918) does not deal with the issue of waiver.

IV

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN REFUSING AN ADJOURNMENT ON THE EVE OF TRIAL TO PERMIT DEFENDANT TO TAKE ADDITIONAL DEPOSITIONS WHERE DEFENDANT MADE NO APPLICATION THEREFOR FOR OVER A YEAR SINCE THE COURT STATED IT WOULD ENTERTAIN SUCH APPLICATIONS

It is axiomatic that the management of the trial calendar properly lies in the control of the Court below.

Defendant had from January 1973 until August 1974 when the pre-trial order was filed to make application if it felt further depositions were required. It failed to do so.

There never was any offer of proof made to the Court below as to the evidence it would have adduced.

Its excuse for failing to move prior to trial that it could not establish the "...further necessity..." suggested by the Court is sheer nonsense.

Clearly, this argument is frivolous and should not countenanced by this Court.

V

THE STATUTE INVOLVED IS CONSTITUTIONAL

Defendant does not attack the constitutionality of the statute per se. It contends instead that it is unconstitutional to apply it in a case where there is no proof of damages.

It was precisely to avoid the many problems inherent in proof of damages that the Supreme Court in The Steel Trader, supra, fashioned a simple, albeit summary rule of liquidated damages for such breach of contract. The court therein stated:

> "...The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract. We think the statute not penal but remedial..."

In Vlavianos v. The Cypress, 171 F.2d 435 (4th Cir. 1948) the court said:

> "...The statute was intended to afford a simple summary method of establishing and enforcing damages which are frequently difficult of definite ascertainment but are fixed by the statute as complete satisfaction for the breach. The Steel Trader, 275 U.S. 388, 48 S.Ct. 162, 72 L.Ed. 326. It should be liberally applied..." id. at 439

Abandonment of the voyage is not required either by statute or by any decisional law. It is sufficient that there be a breach of the statute within the

meaning thereof. Newton v. Gulf Oil Co., supra; Neil v. Gulf Oil Co., supra and Lunquist v. Seatrain Maryland, supra.

VI

THE FINDINGS OF FACT BY THE COURT BELOW ARE NOT CLEARLY ERRONEOUS AS TO WARRANT THIS COURT MAKING FINDINGS DE NOVO

The trial record in this case consisted of five depositions, one live witness and four exhibits.

The essential facts were undisputed.

Thus, it was conceded that the voyage in question lasted less than a month.

The act of diversion of the vessel and termination of the voyage was the unilateral decision of defendant.

Upon termination of articles, plaintiffs accepted their earned wages, signed off the shipping articles, and thereafter many of them were re-employed aboard the Texaco Illinois.

At no time prior to termination of the voyage was the express consent of plaintiffs sought or obtained, nor is it contended by the defendant that any effort was exerted to obtain such consent.

The standard in this Circuit for review de novo is where the undisputed facts are such as to give rise to a definite and firm conviction that the trial Judge was mistaken in her findings of fact. Orris v. Higgins, 180 F.2d 537, 540 (2d Cir. 1950)

It is submitted that there was substantial, if not overwhelming evidence to support the detailed findings of fact made by Judge Motley herein and no basis exists for review de novo.

VII

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN AWARDING INTEREST TO PLAINTIFFS

In Admiralty the general rule is that the court has the discretion to award or deny pre-judgment interest. O'Donnell Transportation Co. v. City of New York, 215 F.2d 92, 95 (2d Cir. 1954); Lekas and Drivas, Inc.v. Goulandris, 306 F2d 426, 429 (2d Cir. 1962)

The exercise of this discretion is not unlimited and the allowance of pre-judgment interest is favored in this circuit unless there are "exceptional circumstances" present militating against such award. Van Nievelt, et al. v. Cargo & Tankship Management Corp., 421 F.2d 1183 (2d Cir. 1970).

In Van Nievelt, as in the instant case, the damages awarded were liquidated in amount and arose out

of breach of contract (charter party). Judgment was consented to but the court below denied plaintiffs' demand for pre-judgment interest. In reversing and remanding with a direction that pre-judgment interest be awarded this Court stated the rule as follows:

> "This general rule in favor of allowing interest is much stronger where, as in the instant case, the damages are liquidated and are based upon a breach of contract. Cf. Gardner v. The Calvert, 253 F.2d 395, 402 (3d Cir.), cert. denied sub nom. Sound Steamship Lines, Inc. v. Gardner, 356 U.S. 960, 78 S.Ct. 997, 2 L.Ed. 2d 1067 (1958); 5 Corbin, Contracts §1046 (1964); 3 Benedict, Admiralty §419 p. 191 (Knauth ed. 1940). And interest must be awarded if the shipowner is to be made whole, since it was unjustifiably deprived of the use of the money.
>
> "Thus unless there were 'exceptional circumstances' e.g., O'Donnell Transportation Co. v. City of New York, supra, 215 F.2d at 95, interest should have been awarded. In the record below and the arguments before this court we find no suggestion of any such 'exceptional circumstances.'" id. at p. 1185.

The rule is the same whether the judgment be predicated on common law or statute, the damages be liquidated or unliquidated. Thus pre-judgment interest was awarded in cases of collision, U.S. v. Panama Transport Co., 253 F.2d 758 (2d Cir. 1958); loss of cargo, Lekas & Drivas Inc. v. Goulandris, supra,

(where pre-judgment interest was awarded for a period of 16 years); failure to pay maintenance; Vaughan v. Atkinson, 369 U.S. 527, 83 S.Ct. 997 (1962); death claims arising under the Death on the High Seas Act, 46 U.S.C. Sec. 761 et seq.; Moore McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961).

In Lunquist v. SS Seatrain Maryland, 359 F. Supp. 663 (D.C. Md. 1973) wherein, as in the instant case, pre-judgment interest was demanded for liquidated damages on an award of one month's wages under 46 U.S.C. Sec. 594 the Court rejected the argument that the statutory provision for liquidated damages precludes the allowance of interest and fixed the rate of interest at six (6%) percent as follows:

> "The liquidated damages provided for by §594 were not authorized 'as compensation for delay in payment' of anything. Their purpose was stated in the passage from Vlavianos v.The Cypress, quoted above. Interest on the amounts allowed under §594 may be awarded, and should be awarded in this case, at the rate of 6% per annum from the date of discharge." id at p. 666

There are no exceptional circumstances present in this case. Defendant admittedly was aware that it had breached the articles without justification and without consent of the crew members whom §594 was inteded to protect. Not one shred of evidence was

offered by Texaco to justify the delay in payment. There was not one iota of difference between this breach of articles and the one four years previous involving the Texaco Georgia when the one month's wages was paid without delay by defendant on the advice of the Shipping Commissioner. Significantly, the testimony of the Shipping Commissioner is totally devoid of any averment that he was ever consulted by defendant as to the validity of the claim in this case.

Defendant does not cite a single authority for its contention that the court below erred in awarding interest.

In the instant case, as noted by Judge Motley, defendant has had possession and control of monies which are rightfully plaintiffs' for over 4 years. There has been no undue delay in the prosecution of this action. (A 116-118)

Clearly, the court below did not err in awarding plaintiffs interest herein.

VIII

THE COURT BELOW DID NOT ABUSE ITS DISCRETION IN AWARDING COUNSEL FEES

The claims of the individual plaintiffs herein for one month's wages varies from a low of $386.44 to a high of $771.10. The average being $496.56. The effort

and legal work involved would have been the same for one claim as it was for the 32 claims.

Courts, in the exercise of their equitable powers, have the discretionary authority to award counsel fees in an appropriate case. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943 (1973); Vaughan v. Atkinson, supra.

The two most commonly cited criteria in favor of the award of counsel fees are (1) whether a public or congressional policy is to be served thereby and (2) whether the failure to award counsel fees would, by reason of the ordinary costs of litigation, result in placing enforcement of the very rights sought to be protected beyond the reach of those who most need its protection.

Thus, in Vaughan, supra, the Supreme Court awarded counsel fees in a case arising out of a recalcitrant failure and refusal to pay maintenance which the court held was a duty imposed upon the shipowner "for the benefit and protection of seamen who are its (admiralty) wards" id. at 369 U.S. 531-532, 82 S.Ct. 1000. The Court went on to say:

> "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief... We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction.

> "...allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts."

In Hall v. Cole, plaintiffs, dissident union seamen, brought an action for reinstatement and damages after what they alleged to be an illegal expulsion. As in the instant case the action was brought under a protective statute, Labor Management Reporting and Disclosure Act, 29 U.S.C., Sec. 412, which contained no express provision for the award of counsel fees to successful litigants.

In reaffirming the equitable power of the courts to award counsel fees our highest tribunal restated the governing principles as follows at 412 U.S. p. 13 93 S.Ct.p. 1950:

> "Moreover, the award of attorneys' fees under §102 is clearly consonant with Congress' express desire to adopt 'legislation that will afford necessary protection of the rights and interests of employees and the public generally...,' 29 U.S.C. §401(b). As the Court of Appeals recognized,
>
> "[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose.

> "...An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but an empty gesture for few union members could avail themselves of it..."

Thus, arbitrariness and wilfulness are not the only criteria justifying an award of counsel fees although this Court has held that where a defendant has knowledge that the obligation to pay wages exists and there is nonetheless a refusal to pay, the delay is without sufficient cause within the meaning of 46 U.S.C. 596. Venides v. United Greek Shipowners Corp., 168 F.2d 681 (2d Cir. 1948)

In Venides seamen's wages had been improperly deducted pursuant to a collective bargaining agreement and defendant admitted having a layman's knowledge of two decisions which held such deduction improper. (Summary judgment was entered for the withheld wages) The sole issue tried was whether the collective bargaining agreement constituted sufficient cause to avoid the imposition of the double pay statute, or whether defendant's knowledge of the prior decisions rendered them chargeable. The Court below directed a verdict for defendant. This Circuit reversed holding as follows:

> "Glandzis v. Callinicos, 2 Cir., 140 F.2d 111 (C.C.A. 2), and Lakos v. Saliaris, 4 Cir., 116 F.2d 440, make it plain that the withholding was improper, despite the Collective

> Agreement. As defendant's officials knew of these decisions, defendant, if it was to avoid liability under 46 U.S.C.A. §§596 and 597, had a heavy burden to show that the refusal to pay had 'sufficient cause.' Nevertheless, defendant did not offer any testimony of either master or of any other of its representatives to the effect that the refusal was based on a belief that there was some doubt because of the agreement." (Emphasis supplied)

In the instant case, as in Venides, supra, defendant was fully knowledgeable as to its obligation to pay the one month's wages under 46 U.S.C. Sec. 594.

Mr. McCarthy, Superintendent of Labor Relations for defendant, testified that in 1967 in a precisely identical situation affecting the Texaco Georgia, on advice of the Shipping Commissioner, he promptly paid the statutory one month's wages.

It is patently incongruous to suggest to the Court that Texaco, the second largest oil company in the United States, had not consulted counsel and fully satisfied itself as to both the propriety and legality of the payment it made back in 1967. Thus, defendant is clearly chargeable with knowledge of its own decision in a prior identical situation and conceded as much when in his live testimony, Mr. McCarthy recalled the 1967 incident stating that he did not want to get "burned again". (TT 164)

No reason whatsoever was given for the failure and refusal to pay the one month's wages on January 21, 1971.

The Shipping Commissioner testified that there was no discussion in his presence of the extra month's wages. In other words, the decision of defendant was made unilaterally, arbitrarily, without consultation with any authority and in total disregard of their own prior experience on the Texaco Georgia.

Thus, even if the standard were arbitrariness, as opposed to serving a Congressional or public policy, the Court below had ample justification for the award of counsel fees.

## CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed and the appeal dismissed with costs and additional counsel fees as to the Court may seem appropriate for the defense of this appeal.

Respectfully submitted,

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OF COUNSEL

Ned R. Phillips

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EARL B. LEWIS, etal.,

Plaintiffs-Appellees,

*against*

TEXACO, INC.,

Defendant-Appellant.

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

James A. Steele *being duly sworn,*

*deposes and says that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N. Y.

*That on the* 10th *day of* September *19* 75 *at* 99 John Street, N.Y., N.Y.

*deponent served the annexed* Appellee Brief *upon*

Bingham Englar Jones & Houston Attn: James MacMahon

*the* Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* 2 ss *herein,*

James A. Steele

Print name beneath signature

JAMES A. STEELE

*Sworn to before me, this* 10th *day of* September *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1976